No. 472

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Supreme Court of the United States

OCTOBER TERM, 1962

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA for the use and benefit of

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MASSACHUSETTS BONDING & INSURANCE COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: THE HONORABLE THE CHIEF-JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, above-named, prays this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the latter's affirmance of the judgment entered in the United States District Court for the Eastern District of New York in favor of the use-plaintiff in the sum of $19,459.75 and costs.

a. Opinions Below

The opinion of the Court of Appeals is reported at 303 F. (2) 823, and that of the District Court at 195 F. Supp. 26. Both opinions are appended herewith. Also there is

appended the opinion of Mishler, J., sitting at Motion Term dated January 5, 1960 granting appellant's motion to intervene on condition that it waive its right to trial by jury (88).*

b. Jurisdiction

i. The judgment of affirmance was entered in the office of the Clerk of the District Court for the Eastern District of New York on the 6th day of July, 1962.

ii. The order of the Court of Appeals denying a rehearing was made on the 3rd day of July, 1962. No extension of time to file this petition was sought.

iii. It is believed that the provisions of Title 28 U.S.C.A., Section 1254, subdivision 1 confers upon this Honorable Court, jurisdiction to review the judgment in question by a grant of this petition for a writ of certiorari to the Court of Appeals, Second Circuit.

c. The Questions Involved

1. May a trial by jury be taken from appellant by judicial direction, where the demand for a jury trial is in an action at common law where the value in controversy exceeds twenty dollars, in clear violation of the right guaranteed to a party by Amendment 7 of the United States Constitution, just because appellant entered this case by way of the intervening statute, Rule 24 of the Rules of Federal Civil Procedure.

2. If it be held that the action of the Courts below in requiring appellant's waiver of a jury trial as a condition to its intervening was lawful, then, the second question is: Was the "clearly erroneous" rule properly applied in an action under the Miller Act by a materialman for the

* References are to appendix to this petition unless otherwise specified.

contract price of lumber sold to the general contractor where the courts below disregarded the evidence of both sides as to the intent of their contract and found instead another contract, where the courts below misapplied the law in holding that plaintiff had "substantially performed" and thus the burden of proving non-performance of the sales contract was shifted to the defending party, and where there were no subsidiary facts in the evidence to support the finding of "substantial" performance on the part of the use-plaintiff and finally, where there was a disregard of uncontradicted evidence proving use-plaintiff's failure to perform according to the contract of the parties.

d. Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Involved

Article 6, Clauses 2 and 3 of the United States Constitution (44s);

Amendment No. 7 of the United States Constitution (44s);

Rule 24(a) of the Rules of Federal Civil Procedure (46s);

Rule 38(a) and (b) of the Rules of Federal Civil Procedure (45s);

Rule 39(a) of the Rules of Federal Civil Procedure (45s);

The Miller Act, 40 U.S.C.A. Sections 270a and 270b (46s-48s).

e. Statement of the Case

This action was commenced by use-plaintiff, a lumber dealer, in the United States District Court for the Eastern District of New York, under the Miller Act, Sections 270 (a) and (b) of Title 40 U.S.C.A., to recover, as a material

man, for lumber sold and furnished appellant, a general contractor with the United States Navy under a contract performed at the Brooklyn Navy Yard within the Eastern District of New York. The action was commenced against the surety alone. After the surety filed its answer, the general contractor, appellant, sought to intervene.

The contract of appellant with the government was dated December 13, 1958. It was for the sum of $158,768. Actually appellant was required to remove the old fender on the side of the pier and replace it with a new one. The new fender had to be fabricated before it could be hung in place. The new fender was a series of timbers, railroad-tie size, actually 12 x 12, formed into squares and quadrangles called bays, 8 feet wide, joined together, and hung the length of the pier a distance of some 1,400 feet. The fender was hung on steel brackets affixed into the pier itself in such a manner that it would ride up and down in the brackets. The greater the pressure against the fender, the higher up on the brackets the bays would rise. The ship would lay against the side of the bays, without damage to its skin or to the side of the pier, the bays providing a cushion for the ship. The timbers of the bays had to be cut to size, squared, bevelled, notched at the places where the cross-pieces would be joined to the upright pieces, which notching had to be deep enough and wide enough to allow for the pieces to be joined together with their surfaces flush. This notching was called "dadoes" under the contract and is referred to in that manner by the parties. The word chamfering is also used by the parties. This means the same as bevelling, only it is applied to a timber whose lengthwise edge has been cut. Also, because the timbers were to be bolted together, holes had to be drilled at the specified places and aligned to receive the bolts, and, the bolt heads had to be countersunk to below the surface of the fender's surface.

The use-plaintiff agreed to furnish and fabricate the necessary timbers for the fender. It agreed to deliver

them to the job site within a time specified in the contract as commencing 5 to 6 weeks and completely delivered within 90 days. Both use-plaintiff and the contractor testified that it was the intention of the parties that the use-plaintiff was to furnish the timber so fabricated as to enable the contractor to bolt the timbers together which would make them ready for hanging over the side. Thus, both sides said, there would be but a single assembly operation of the timbers, by the purchaser, the general contractor,. The testimony of this intention of the parties as given by the plaintiff appears at pages 14-18 of the Intervenor Appellant's Reply.

In addition to this testimony of the terms of the contract of sale, there were the following writings said to evidence the agreement of the parties.

(a) Plaintiff's Exhibit 1: Appellant's contract with the Navy dated December 13, 1958.

(b) Defendant's Exhibit M: Government specifications for lumber to be supplied for fender system.

(c) Defendant's Exhibit N: Government drawings of Specifications for lumber to be used in fender system.

(d) Plaintiff's Exhibit 2: Plaintiff's offer dated December 15, 1958, to supply the timber for said contract, together with appellant's acceptance, written thereon.

(e) Plaintiff's Exhibit 3: Plaintiff's letter to appellant dated January 16, 1959, being the first confirmation of intervenor's order.

(f) Plaintiff's Exhibit 4: Shop drawings.

(g) Defendant's Exhibit A: Defendant's letter to plaintiff, confirming order for timbers, to meet Navy specifications.

(h) Defendant's Exhibit J: Plaintiff's letter of January 27, 1959 to the U. S. Navy confirming the sale of

lumber to appellant and requesting inspection by Navy personnel.

(i) Defendant's Exhibit E: Copy of U. S. Navy letter of January 29, 1959 to the Navy's Pennsylvania office requesting them to inspect lumber, which copy was sent to plaintiff.

(j) Plaintiff's Exhibit 5: Plaintiff's second confirmation of previous order, signed by appellant.

Note that each of the foregoing exhibits are dependent upon each other to express the contract of the parties and not one of them can be said to contain the whole contract and in neither event is the intention of the parties aforementioned stated in any of the writings. Yet, that intention was expressly testified to by the parties as being the bargain which had been agreed upon by them. The total price for these timbers was $25,049.59.

Later, on three separate occasions, three additional orders for additional lumber were given for a total of approximately $2,000, but the contractor raised no objection to the use-plaintiff's fullfilment of these contracts and they are not in the picture, except in a very indirect way. This dispute centers around the first contract or order for timbers, the one for $25,049.59 because they were not fabricated as required by the contract of the parties. As between the parties, the only dispute, before this suit was commenced and on the trial, was how much was to be paid appellant for doing the corrective fabrication. No dispute existed between them as to the terms of the contract. Yet, the court found that the only terms were those stated in the use-plaintiff's letter of January 29, 1959, which is marked Plaintiff's Exhibit 5, which says nothing about the fact that the fabrication of the timber was to be done so as to enable the petitioner to assemble them into bays of the fender system. Both courts found that said Exhibit 5 was the contract of the parties in disregard of the undisputed and conceded evidence above-

mentioned. Nor was there a dispute between the parties that the timbers when delivered required holes and certain corrective fabrication to make them suitable to be joined together into bays and that this additional work necessitated a prior temporary assembly of the timbers. So that, instead of one assembly, two assemblies took place before the bays could be formed and joined for hanging overside. After disregarding the uncontradicted proof on this kind of seller's performance of the contract, both courts by asserting that a seller need show only "substantial" performance, improperly shifted the burden of proving the seller's failure to perform according to the contract upon petitioner, the buyer. Even here, both courts concluded as they did without support in the subsidiary facts, in fact, in contradication to the only evidence of the condition of the timbers upon delivery which was that upon delivery, the timbers were not suitable for the last assembly operation. In other words on the question of the nature of the seller's performance, the courts below not only applied an erroneous rule of law, but they did so without any support in the evidence for that erroneous rule of law.

The chronology of the events leading to the performance of the first order for timbers was as follows:

The first delivery was April 28, 1959. This was of horizontal pieces only, forty in all. Without the vertical pieces no work could be done on the timbers. Hence they were a useless delivery. This delivery was about ninety days from the date of the last writing of the parties. Even that writing required the first third of the total order to be delivered in five or six weeks, or by March 15, 1959. The second delivery was also of horizontal pieces only and that of 60 pieces and was made on May 4, 1959. This delivery too, was useless as no work could be done with these until the vertical pieces were also delivered. The first delivery of vertical pieces was made on May 22, 1959. The rest of the deliveries came in after May 22, 1959, the last one

on August 10, 1959. The delay in the commencement of deliveries was attributed to the failure of the use-plaintiff's fabricator to drill the holes in the timbers.

While waiting for the timbers, the Navy ordered petitioner to visit the plant of the fabricator, the National Wood Preserving Company of Haverford, Pennsylvania, which had been employed by the seller for that purpose. The petitioner visited the plant at Haverford in the company of Anderson plaintiff's representative, on May 15, 1959. While there the parties agreed that the drilling would be done by petitioner at a cost to be determined later. The bevelling, cutting to size, the squaring and dadoing was to be continued by use-plaintiff. The testimony as to the terms of this new arrangement was in dispute in one respect only, i.e. the price. The use-plaintiff claimed on the trial that the price was to be the same as its own charge of 20 cents per hole made to petitioner under its letter of January 29, 1959, Plaintiff's Exhibit 5. The petitioner stated that the price could not be agreed upon as the cost of the drilling was an unknown factor. There was a witness to the conversation, a Mr. Jacoby, president of National Wood Preserving Company, and he said that he did not hear any discussion about the twenty cents but only that the drilling would thenceforth be done by petitioner. The trial court found that there was no agreement made about the price for the drilling to be done by petitioner. Therefore it said, and the Court of Appeals agreed with it, that as there was no proof of an agreement on price, it would allow the 20 cents claimed by use-plaintiff. The courts below said not a word about a fair and reasonable price to be paid to petitioner. Petitioner sought to recover its proven cost of the drilling. This was not allowed. Yet, use-plaintiff had pleaded a cause of action for the contract price of an executed contract of sale as modified in the respect that delivery was to be without holes as previously agreed at a credit to the purchaser of twenty cents per hole. Proof of the contract and of its

modification normally would have to be made by the use-plaintiff for that was its pleading, but the courts placed the burden of proving the agreement of a specific price change upon petitioner, instead who had only pleaded and sought recovery on a *quantuum meruit* basis.

There was no attempt by use-plaintiff to prove that at the job site the timbers it delivered were as specified and as required by the contract and according to the aforesaid intention of the parties. The only proof on the condition of the timbers at delivery came from the evidence of the general contractor, its engineer and the government inspector whose duty was to check the job for the government. These people not only saw the timbers but the president and the engineer actually engaged in the work to make the timbers fit for the purposes intended. The timbers according to these witnesses and their daily records were so improperly fabricated or were so damaged in transit, that the general contractor was obliged to dadoe, bevel, chamfer, cut to size and square them. In some cases, the timbers were too short, petitioner applied for and received the government's permission to make the bays 7 or 7½ feet wide to accommodate the short sizes. This necessitated cutting to even lengths, bevelling and dadoing anew. Some of the timbers were received at the job site damaged in transit and some of these were salvaged by cutting them down to horizontal piece size to replace damaged horizontal pieces or they were replaced altogether by the general contractor out of his own stock, or from another dealer. This work of drilling and corrective fabrication was commenced on May 22, 1959 and went on through to December 1, 1959. It was recommenced in April, 1960 and was continued to the middle of May, 1960. This last period was after this suit was started. This latter work was the work done to make the "new" timbers ready. They had to be fabricated from the rough state.

As the suit was started against the surety alone, the general contractor wanted to intervene to press its counter-

claim. In moving to intervene, it attached its proposed pleading and across the face of the proposed pleading, there was written "Trial by Jury Demanded". The motion was heard by District Judge Mishler who by decision dated January 5, 1961, stated

> "Motion to intervene pursuant to Rule 24 is granted upon condition that intervenor waive right to trial by jury * * *."

An order was entered upon said decision and pursuant thereto appellant filed its plea of intervention and the waiver required by the court. The waiver specifically recited that it was made only in compliance with the order of the court (10s).

The case thereafter went to trial before District Judge Byers who dismissed the counterclaims of the appellant except for $381 and allowed the materialman to recover the price, erroneously, as mentioned above.

ARGUMENT

I. The decision of the Court of Appeals in upholding Judge Mishler's order requiring appellant to waive its right to a trial by jury as a condition to intervening in this action, decides an important Federal law in a way in conflict with the applicable decisions of this court, or which perhaps, has not been precisely before this court and should be settled by this court, and in any event, said decision has so far sanctioned a departure by the lower court from the usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The Court of Appeals in upholding the District Court's decision in requiring that the jury be waived by petitioner as a condition to its intervening in this case stated as follows:

> "It is important that this fundamental right be preserved intact and not eroded by unsympathetic interpretation or the imposition of conditions designed to clear up the calendars of the courts. We sustain the action of Judge Mishler in granting the motion to intervene on condition that there be filed a waiver of jury trial, and we do so only because of the peculiar circumstances of this particular case and because we believe the dilatory tactics here practiced and other maneuvers that we find it not necessary to describe in detail are not to be condoned."

The Court of Appeals' shedding a crocodile tear for a constitutional guarantee, obviously is not the way for the court to satisfy its duty to uphold a constitutional guarantee. It must enforce the right no matter how obvious the duty. It is apparent that the court wanted to punish the petitioner, but it cannot do so at the expense of the violation of a constitutional right. If it does so, then you will have government by men and not by law. This is repugnant to everything this court has stood for since its beginning.

In the first place the constitution is the supreme law of the land. It is binding upon the courts, as well as the other branches of the government. *Marbury v. Madison*, 5 U. S. 137, 1 Cranch 137, 180.

In the second place there is no evidence to support the conclusion of the court that there were any dilatory tactics practiced here or that there is any necessity for punishing the petitioner.

The Seventh Amendment of the United States Constitution reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The constitution not only declares that the right of trial by jury is one of the rights guaranteed to the people, but it imposes upon those responsible for the operation of the government under it and specially upon the judiciary, the obligation to enforce it. Article 6, subdivision 2 of the constitution declares that the constitution is the supreme law of the land automatically making it binding upon the courts. That would also make it self-executing and no rule, statute or regulation is needed to implement it. Even this court is subject to the constitution, as it is a constitutional court, and the question was so decided heretofor. As a legislative Court, the Court of Appeals may aid in the interpretation of the constitution, subject to the supervision of this court, but it cannot refuse to be governed by the constitution. The oath of office of each judge binds him to uphold the constitution.

Where a court in this land has deprived a party of his constitutional guarantee, it would no longer have jurisdiction to proceed. The constitutional mandate is an essential prerequisite to a Federal Court's jurisdiction.

Johnson v. *Zerbst*, 304 U. S. 458, 467, 468.

The court's obligation is to guard and enforce every right secured by the constitution.

Mooney v. *Holohan*, 294 U. S. 103, 113;
Robb v. *Connolly*, 111 U. S. 624, 637;
Marbury v. *Madison*, *supra*;
Reid v. *Covert*, 354 U. S. 1, 10.

Obviously, if it does not, it sets itself up above the constitution. Every decision finding an exception to the constitutionally guaranteed rights, when there is none, destroys and lessens the influence of the constitution, and corollarially, the judiciary imports into the judicial system more power than is rightfully entrusted to it under the constitution.

The Court of Appeals in this case said that appellant was not entitled to a jury trial. Yet, this action is an ordinary common law suit on a contract to recover a money judgment. The sum exceeds twenty dollars. Both the use-plaintiff and the petitioner demanded money judgments, the use-plaintiff in its complaint, the petitioner in its counterclaim. Petitioner, therefore, had the right to defend this action before a jury and also to press its counterclaims before a jury. This court has already stated with respect to a sub-contractor's suit, in a predecessor statute, to the Miller Act, that the nature of the cause of action is not changed from its original form of a common law action for breach of contract.

Illinois Surety Co. v. *Peeler*, 204 U. S. 214, 223-225.

The lower courts have recognized the right to a jury trial in a *Miller Act* case.

R. P. Farnsworth & Co. v. *Electrical Supply Co.*, 112 F. (2) 150, cert. den. 311 U. S. 700;
U. S. for Use of Mutual Metal Mfg. Co. v. *Biggs, et al.*, 46 F. Supp. 8, 11;
U. S. For Use of Reichenbach v. *Montgomery*, 155 F. Supp. 384;
Nolan Bros. Inc. v. *U. S. for Use of Fox Bros. Const. Co.*, 266 F. (2) 143.

The Rules of Federal Civil Procedure implement this constitutional right of trial by jury in a civil case by requiring how, procedurely, it shall be preserved. Rules 38 and 39a of the Rules of Civil Procedure.

The demand of the petitioner for a jury trial was made simultaneously with the making of the motion for permission to intervene by writing across the face of the proposed pleading of this petitioner, the legend that petitioner demanded a "trial by jury". This was the first entrance

of the petitioner into this case. Therefore, the time of making this demand, insofar as this petitioner was concerned, was well before the expiration of the time to demand such right as required by Rule 38a. The courts below recognized the timeliness of the demand for they did not dispute it. They recognized, too, that the action was an ordinary common law suit for a money judgment in excess of twenty dollars, for they did not dispute this fact either. The discussion of the facts in the decision of the Trial Court and of the Court of Appeals confirms the common-law nature of the action and of the counterclaim. Yet, both courts decided to deny the right of the petitioner to a jury trial. The District Court did not express its reasons except that on the oral argument it stated that a case such as this can be better tried by a judge without a jury. The Court of Appeals, however, went further and placed the waiver upon a ground which it inferred from its own examination of the papers submitted to the District Court, but which, it must be respectfully stated is not supported and does not logically follow from the facts relied upon by the court. Nevertheless, the constitution does not admit exception to the right of a party to demand a jury trial. Its command is "the right of trial by jury shall be preserved". An exception would violate the constitutional mandate. Either the court is right or the constitution is. The court would impose limits upon the right where the constitution does not. Indeed, the constitution places a ban upon the exercise of the judiciary powers of the Government and that ban is all inclusive. It relegates all such trials to a jury, not to a judge. It does not contain any ground upon which the District Court can say that, in its opinion, the case can be better tried by a judge without a jury. Nor, does it contain any words that allow the Court of Appeals to say that a demand for a jury trial can be stricken whenever the court decides that its use was a means at delay. Petitioner can rest its argument that this petition should be granted upon the plain and obvious

words of the Seventh Amendment; but there are decisions of this court which have had occasion to expound upon the importance of that right under various circumstances although none considered the case where the party seeking the right to a jury trial was also seeking to intervene in the action. As recently as in April of this year this court had occasion in *Dairy Queen Inc.* v. *Wood*, 369 U. S. 469, to hold that the denial of a jury trial posed an important problem which this court would take under advisement. It held that there a trial by jury on legal claims had priority over equitable claims triable by a court, even though there seemed to have been some confusion in the pleadings filed as to the true nature of the cause of action. This court took occasion to note that the principle that a litigant should not be deprived of his right to a jury, is a long established principle. This court also decided a great many cases of which the following are but a few, which upheld the inviolability of this right of a litigant.

Beacon Theatres Inc. v. *Westover*, 359 U. S. 500;
Scott v. *Neely*, 140 U. S. 106, 110, 117;
Cates v. *Allen*, 149 U. S. 451;
Thompson v. *Railroad Companies*, 6 Wall. 134;
R.F.C. v. *Bankers Trust Co.*, 318 U. S. 163, 170;
Hodges v. *Easton*, 106 U. S. 408, 412;
Galloway v. *U. S.*, 319 U. S. 372, 396, 411.

In *Hodges* v. *Easton*, *supra*, this court stated that a party may waive its right to a jury trial but that right can never be taken away from him. Also, this court stated in *R.F.C.* v. *Bankers Trust Co.*, *supra*, at page 170, "In actions at law the jury is the traditional trier of facts, whose function as such is preserved and guaranteed by the fundamental law."

In this case both the lower courts demanded that the waiver be made and as such, the waiver was not a voluntary act of the petitioner, but was instead a surrender of its

right of trial by jury, forced by judicial decree. A waiver, has been said by this court, must be factual, it cannot be fictitious. There must be a surrender, not resistence.

Freeman v. *Bee Machine Co.*, 319 U. S. 448, 459.

The right of the intervenor under Rule 24 (a) of the Rules of Federal Civil Procedure was a matter of right not a matter of discretion with the court below. The petitioner in intervening had a counterclaim to prosecute. This could not be done by the surety in its own defense of the action brought by the use-plaintiff. Also, a decision in the action against the surety alone would be *res adjudicata* of the rights of the petitioner against the use-plaintiff.

U. S. for the Use of Foster Wheeler Corp. v. *American Surety Co.* (2 C. A.), 142 F. (2) 726.

It is obvious, that the surety was not in possession of the facts of the case but that the petitioner was and that, therefore, the surety was not in the best position to defend against the action. Both courts recognized petitioner's right to intervene. They did not base their denial of a jury trial upon a claimed right to a use of discretion as to whether or not to let the petitioner into this litigation. Rather the Court of Appeals, it is respectfully submitted, took it upon itself to punish petitioner because of a supposed claim of delay. Yet, examining the record, as this court can very well do, because there is here involved a constitutional question and this court is not precluded from examining the facts to determine whether there is evidence to support the conclusion, we find that the court went out of its way to call the petitioner names without having any basis in the facts for its decision. There was no delay attributable to this petitioner. True, this action was commenced in April, 1959 and issue

was joined late in August, 1959. The time between was spent by the parties in serious endeavors to settle the litigation (3s-4s). This time then was spent more in looking toward the conclusion of the litigation rather than in extending its life. Accordingly, this period of time spent could not be charged to the petitioner. Furthermore, the suit was one commenced by the use-plaintiff and it had elected to name the surety only as a party defendant. It must have expected that the petitioner would intervene. In the meantime, only the surety was obliged to do anything about the suit. The surety filed its answer as late as August 30, 1960, having had the consent of the use-plaintiff to extensions of time. The petitioner began the preparation of its petition immediately after the filing of this answer. The petition was completed by September 6, 1960. The proposed pleading was not prepared by that date. However, while being engaged in the preparation of the pleading and before all of the supporting papers were ready, the use-plaintiff served notice to take the deposition of intervenor although it was not yet a party (4s). Accordingly, further work on the preparation of the papers to intervene was suspended, to await the outcome of this proceeding, initiated and prosecuted by the use-plaintiff (4s). The notice of taking the deposition of petitioner was returnable October 21, 1960. The petitioner appeared on that day and on that date the deposition was taken. A copy of the deposition was not received from use-plaintiff until November 15, 1960 (4s). The motion to intervene was filed November 25, 1960 (1s). This then is not the action of one who would delay for delay's sake. Without specification, the Court of Appeals seems to have concluded that there were all manner of delaying tactics employed by the intervenor at this point, yet the only action taken by the intervenor was to appear for the pre-trial deposition at the time set by use-plaintiff and immediately thereafter it moved to intervene in this action. If the use-plaintiff wanted to

have hurried the proceedings it could have named petitioner as a party defendant. Then a default would have been noted if the answer were not timely filed. The use-plaintiff preferred to proceed against the surety alone and it must have contemplated the action of the petitioner to intervene. The petitioner could not intervene until the pleadings were closed. In any event, by intervening; it was not intended that the trial which the use-plaintiff wanted would be delayed for a trial could have been set for the same day as was actually set and yet, the right of trial to jury could have been preserved. Accordingly, the conclusion of the Court of Appeals is without basis or foundation in the facts and there is no fact to support it. The only fact that is mentioned by the court was a scratching out of the date September 6, 1960, in the petition, but this act is explained as being caused by the fact that use-plaintiff served its notice to take the pre-trial deposition of the petitioner while the papers were being prepared. It was not caused by any intent to delay the trial. The scratching was not complained of by the use-plaintiff. The Court of Appeals, on its own motion, noticed the change and jumped to the conclusion of delay. This conclusion does not follow from the action noted. It is illogical to conclude from one particular event which admits of many possibilities, one of many generalizations. Many other inferences can be drawn from this act among them the explanation given, which was the truth. In the district court, petitioner submitted an affidavit explaining these events (2s-8s). No contradiction of these explanations were made by use-plaintiff. The Court of Appeals apparently overlooked this affidavit of the petitioner.

The nature of the language used by the court is indicative of its not being sure of the facts. It makes general accusations of dilatoriness and states that it is "all too plain", in an accusing tone, and it makes another accusation that intervenor had "an ace in the hole". This

is a pure figment of the imagination of the court. How could petitioner have "an ace in the hole" by intervening and demanding a jury trial. What intervenor did was lawful. How could it be "an ace in the hole" or "all too plain". To intervene and to demand a jury trial are vested rights. They cannot be called unlawful when they are not and least of all by calling them names that have no meaning or any basis in the facts. Rather, the decision seems to stem from an arbitrary decision not to recognize this valid right given to the petitioner under the Constitution. Probably, this is a by-product of the court's conviction on the merits of the case, which is also a conviction which is not based upon any fact in the evidence on the trial. Such conviction was probably induced by the strong and relentless attacks of the appellees upon the creditability of the petitioner, which attacks are based not upon the evidence but upon name calling and maligning references to improperly drawn inferences from subsidiary facts not subject to those inferences. This matter is being explained in point "II" of this petition. It must be kept in mind that the proceedings below was not created by the petitioner. Instead the petitioner has been caught in a swirl of a series of erroneous judicial action stemming from the unlawful denial to a jury trial and the relegation to an unconstitutional court. The fact that further delay may be experienced by the parties to this case after this court confirms the right of the petitioner to a jury trial was envisaged by the Congress for it specifically provided for appeals only from the final decision.

Roche v. *Evaporated Milk Asso.*, 319 U. S. 21, 30; *U. S. Alkali* v. *U. S.*, 325 U. S. 196, 202, 203.

Consequently, this court is urged to examine the decision of the Court of Appeals in finding exceptions to a trial by jury in this case on both the law and the facts.

Baumgartner v. *U. S.*, 322 U. S. 665, 670, 671; *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404.

In the foregoing two cases this court stated that whenever a constitutional question is involved, the court will look to the evidence to see if there is support for the conclusion.

Petitioner respectfully prays this court to grant certiorari because of the importance of the right of a trial by jury which right has been denied to petitioner in clear violation of the constitutional mandate and because this court as the guardian of constitutional rights and guarantees should speak on the subject of the lawfulness or unlawfulness of denying this guarantee to a litigant who is entering a suit by way of the intervention statute or is being unjustly accused of delaying tactics. This court has said: "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 486. This very aptly describes the need in this case.

II. Should this court refuse to review the denial of a jury trial, then it is respectfully submitted that this court should review the merits of this case because the Court of Appeals has improperly applied the "clearly erroneous" rule, or has applied it in such a way which is in conflict with the applicable decisions of this court.

Petitioner is not unmindful of the "two court" rule and the reasons for invoking it. See *Hart & Wechsler*, The Federal Court and The Federal System, page 1390. Yet, petitioner feels that where the Court of Appeals has sanctioned a misapplication of the law, or has, with the trial court refused, to be bound by the conceded evidence or by the uncontradicted evidence, then an old-fashioned error

of law has been committed which is within the ordinary power of this court to correct. May not the "two court" rule nevertheless, apply? Perhaps, but in this case, it is petitioner's belief that the Court of Appeals has not properly applied the "clearly erroneous" in violation of its duty as an appellate tribunal and in violation of the rule as established by this court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395. This court there said that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." If note is taken of the words "on the entire evidence" one must conclude that this court meant that the reviewing court must read all the evidence in the case. As the decision of the trial court is based upon surmise and speculation, for there was no evidence to support it, and as there was evidence contrary to the court's findings which evidence was conceded or stood alone and uncontradicted, and as the Court of Appeals, too, followed the same findings of the trial court, it is inferable that the failure of the Court of Appeals to find what was clearly in the record could only be due to a failure to see it. This together with other reasons which will be set forth hereinafter impels an inference of a failure to consider all the evidence that was in this case. Hence, the "clearly erroneous" rule was improperly applied. True, the Court of Appeals states that it went through the record of this case. Yet, its decision is not an independent expression of findings based upon specific subordinate facts. It is a generalized approval of the facts found by the trial judge with an acknowledgement of that judge's patience and long years of service. The Court of Appeals' harsh language also appears to be a substitute for an independent investigation and consideration of the facts. It seems likely that the Court of Appeals only read that part of the record made by the trial court's caustic treatment of petitioner's evidence as it was going into the record at

the time of trial, which extended for more than nine hundred pages of testimony when it became saturated with animosity toward petitioner's cause and it let the balance of the seventeen hundred pages of testimony go unread or at best, not thoroughly understood. The test of a conclusive finding is to find support in the evidence for it, to see if there is any "substantial" evidence to support the trial court's decision.

I.C.C. v. *Louisville & Nashville R.R. Co.*, 227 U. S. 299;
Stern, *Review of Findings*, 58 Harv. L. Rev. 70, 75.

The duty of the court is to examine the record as a whole, not only to rely upon the general good reputation of the trial judge. It is to ascertain whether there is any substantial evidence to support the decision under review, from the record as a whole.

Consolidated Edison Co. v. *N.L.R.B.*, 305 U. S. 197, 229;
Galloway v. *U. S.*, 319 U. S. 317, 372, 396;
N.L.R.B. v. *Columbian Co.*, 306 U. S. 292, 300.

The petitioner pointed out to the Court of Appeals that the trial court erred:

a. In finding the nature and terms of the contract of sale, in that it disregarded the conceded and uncontradicted evidence of the parties.

b. On use-plaintiff's performance of the contract, in disregarding use-plaintiff's lack of proof and in disregarding the defendant's proof on the point which was the only proof of the fact.

c. On the law applicable, in disregarding the use-plaintiff's burden of proof of the contract sued on and of its

performance, as a condition to its recovery of the contract price and in place thereof, applying a so-called "substantial" performance rule and by this means it placed the burden of non-performance on the buyer.

Hence, errors of law were advanced which are, nevertheless, examinable in this court.

> *Palmer* v. *Conn.*, 311 U. S. 544, 558;
> *Baumgartner* v. *U. S.*, 322 U. S. 665, 670, 671;
> *Morimurai Ara* v. *Taback*, 279 U. S. 24, 33;
> Stern, *Review of Findings*, 58 Harv. Law Rev., 70 (1944), 89, 90, 113.

Stern says at page 113, "Public interest does not require that the Appellate Court accord any degree of finality to the judgment of the trial court as to application of law to facts, but points the other way."

Further, this Court says "to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests for that fact."

> *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 405.

A comparison of the decision of the trial court with the decision of the Court of Appeals will bear out petitioner's position.

As to the Nature and Terms of the Sales Contract of the Parties

The trial court found that the contract consisted of the single writing marked Plaintiff's Exhibit 5, a letter written by use-plaintiff on January 29, 1959 and signed by petitioner on February 2, 1959. The Court of Appeals found the same fact.

Yet, the conceded and uncontradicted facts show that this letter alone does not constitute the whole of the agreement between the parties. The whole contract shows that the timbers to be supplied were to be used in the fender sysem being required under the contract between petitioner and the United States Government and it was the intention of the parties that the timbers were to be fabricated by use-plaintiff to such an extent that all petitioner would have to do to the timbers, when received, was to assemble them together and hang them over the side. The timbers, fabricated as specified by the government specifications and drawings, and by the government approved shop drawings would have been made ready for such an assembly operation. Anderson for use-plaintiff testified to such effect. Gustavsson for petitioner also testified to such effect. Hence both parties were in agreement on this intention of theirs.

Both parties also testified that Exhibit 5 was only a confirmation of the previous writing dated January 16, 1959, which was marked Defendant's Exhibit 2. Exhibit 5 says that it confirms Exhibit 2. Exhibit 2 is also a letter written by use-plaintiff and signed by petitioner. The letter is dated December 16, 1958, but petitioner signed it on January 16, 1959. Hence they referred to it as a January 16, 1959 paper. This Exhibit 2 refers to the government contract. It is use-plaintiff's offering to supply the lumber for the fender system. The government contract was in evidence as Exhibit 1. The government's specifications for the lumber was marked Defendant's Exhibit M. The government drawings of the specifications for the lumber were marked Defendant's Exhibit N. The government approved shop drawings for the lumber were marked Plaintiff's Exhibit 4. Also there was a letter from use-plaintiff dated January 16, 1959 confirming acceptance of the order and it was Plaintiff's Exhibit 3. There was a letter from defendant dated January 24, 1959 which informed use-plaintiff that the timbers required had to

conform to government specifications. This was marked Defendant's Exhibit A. There was a letter from use-plaintiff written to the U. S. Navy on January 27, 1959 confirming the sale of the timbers to petitioner and requesting the Navy to inspect the material which was written in accordance with the contract. This was marked Defendant's Exhibit J. Finally there was a copy of the Navy's letter of January 27, 1959, written to their Pennsylvania personnel requesting an inspection, which copy had been sent to use-plaintiff in evident acknowledgment of use-plaintiff's letter of January 27, 1959. This was marked Defendant's Exhibit E. All of these writings and the oral testimony of Anderson and of Gustaysson spoken of above was urged upon the Court of Appeals as proof of the contract between the parties. See intervenor-appellant's reply brief, pages 12-18 inclusive. Citations to the pages in the transcript of the testimony were faithfully made. Yet, there is not a sign of recognition of any of these writings or of the conceded oral testimony in either decision of the courts below.

Citation was also made to the case of *U. S.* v. *Morley Construction Co.*, 98 F. (2) 781, 786, as authority for the rule that where a subcontract refers to the main contract between the government and the general contractor, then the parties to the subcontract are considered to have adopted the terms of the main contract. Anderson's testimony is even set out in full at pages 15-16 of said brief. All this was wholly ignored by the Court of Appeals.

As to the Nature of Plaintiff's Performance

The importance of understanding this intention of the parties to this contract is that then the quality of performance of its contract by the seller is made clear. In this case, use-plaintiff made no proof that the timbers were so fabricated that they could be joined together and put over the side. The only proof of the quality of the fabrication of the timbers was that made by petitioner and that

proof was of timbers improperly fabricated or not fabricated at all. Petitioner's witnesses stated that the lengths of the timbers were uneven. The ends of the timbers were not squared off. The bevels were on the wrong side of the timbers or were missing. The chamfers were too shallow or missing. The dadoes were too small or missing. There were no holes. To do all this extra work a prior assembly operation was necessarily performed. These conditions were observed and testified to without contradiction. Thus the quality of the fabrication, if related to the contract of the parties as evidenced by the conceded testimony as to what the intention of the parties was, became important. It was nevertheless ignored below. Hence, petitioner's evidence that the timbers delivered were not as agreed upon, that they were not suitable for the purposes intended by the parties, was ignored and probably not understood at all. In addition to the testimony as to what they saw regarding the timbers as they were delivered to the job-site, petitioner's witnesses also described in detail the work performed by petitioner's work force to make the timbers suitable for the purposes intended. This latter testimony was that the work was performed continuously between May 22, 1959 and December 1, 1959. Then the work was resumed in April, 1960 and continued to May, 1960. See pages 20 to 30 inclusive of the reply brief aforementioned. In testifying about what fabrication was done by the petitioner the witnesses stated the nature of the work done, whether chamfering, cutting dadoes, squaring ends or cutting to even lengths or drilling. The work done on each day was described. The number of employees employed was specified and the number of total hours on the separate parts of the work performed was given. None of this testimony was contradicted. It was all ignored.

The use-plaintiff simply relied upon the fact that delivery of the timbers was conceded by petitioner as proof of its performance. An attempt was made to show an excuse for late deliveries and to show some inspection made

at Pennsylvania, but the fact that deliveries were late is conceded, and the fact that an inspection made at Pennsylvania is not probative of the quality of the fabrication at the job-site is obvious. The seller's obligation was to deliver the timbers fabricated as specified to the job-site. Recognizing this insufficiency of proof, the trial court applied the "substantial" performance rule usually applied to construction contracts to excuse this lack of proof of the use-plaintiff. Yet, the rule in sales where the seller sues for the contract price is for the seller to prove performance of its contract according to its terms before he may recover.

Sec. 260, Restatement of the Law-Contracts;
Sec. 92, Subd. 2, Personal Property Law;
Sec. 122, Personal Property Law;
Frankel v. *Forman* (2 C. A.) 33 F. (2) 83;
Thomson Co. v. *International Compositions Co.*, 191 App. Div. 553; 181 N.Y.S. 637;
John Tull's Sons, Inc, v. *Williams Engineering Contract, Co.*, 136 App. Div. 710; 121 N.Y.S. 478;
News Syndicate Co. Inc. v. *Gotti Paper Stock Corp.*, 256 N. Y. 211;
Riduss, et al. v. *Polcoff*, 175 N.Y.S. 756.

Though delivery of the goods was conceded, delivery alone does not comport with acceptance, which in the final analysis is a burden of the seller to prove.

3 *Williston on Sales;* Rev. Ed., Section 485.

On the question of use-plaintiff's performance, the trial court said, "It should be said at once that the burden of proof is upon defendant, plaintiff having shown delivery of what it contracted to provide as will be demonstrated." The court, however, failed to "demonstrate". There is nothing in that opinion which states the condition

of the timbers at the job-site. More importantly it placed the burden of proof on the wrong party. It was the use-plaintiff which was seeking the contract price. It had pleaded a contract of sale. It had even pleaded a modification of that contract, viz.: that for twenty cents per hole the petitioner would take over the drilling of the required holes in the timbers. *Allegata et probata.* This principle was not alone not mentioned; it was not even acknowledged. The trial court in placing the burden of proof upon the defendant contradicted the principle. The court relied upon:

> *U. S. etc.* v. *Wunderlich Contracting Co.*, 228 F. (2) 65 (p. 68);
> *U. S. etc.* v. *American Surety*, 142 F. (2) 726 (p. 728);
> *U. S. ex rel. Johnson* v. *Morley Const. Co.*, 98 F. (2) 781 (p. 789);
> *U. S. etc.* v. *McCay*, 28 F. (2) 777 (Point 10, p. 780).

None of the foregoing cases support the court on the burden of proof. They state the "substantial" performance rule, not a burden of proof rule. The substantial performance rule may be likened to the separable contract rule. The burden of proof rule is stated in the authorities set forth herein by petitioner. The trial court even failed to find any subsidiary fact to support the substantial performance rule. As a result of this improper reliance, the trial court, without evidence of performance of delivery of the goods according to the terms of its contract of sale allowed use-plaintiff to recover the contract price.

The Court of Appeals affirmed, even adding a case of its own restating the substantial performance rule, without acknowledging the true problem of deciding whether or not the burden of proving performance was

with the seller. It stated its position colorlessly as: "On this state of the record, we think the trial judge quite properly applied the doctrine of substantial performance." On what state of the record, can very well be asked. There is no discussion of the necessary subsidiary facts which could support such a mixed question of law and fact. Neither court attempts to discuss these subsidiary facts. Necessarily, they would be that the timbers were of such sizes, that they were dadoed and chamfered and bevelled and squared as required. The courts, both trial and appellate, do not premise that finding on such necessary evidence and, for a very good reason. There is no such evidence in the record. This is one of the reasons why petitioner feels that there was a failure to consider the whole case.

The treatment of the drilling of the holes is another reason. The Court of Appeals merely repeats what the trial court said and it, too, overlooked the law applicable. The trial court stated that because there was no agreement on the charge which petitioner was to make for the drilling that he must take the twenty cents at which plaintiff said it would do the drilling. The Court of Appeals said the same thing. Yet, the fact of the matter is that use-plaintiff pleaded performance of the sales contract as modified by a later agreement whereby petitioner was to do the drilling and use-plaintiff was to allow a twenty cent per hole credit therefor. Here, then, the use-plaintiff was recognizing that even if its contract stated that it had agreed to do the drilling for twenty cents per hole, it could not say, in the absence of an express agreement, that it could bind petitioner to the twenty cent charge for taking over the drilling. It recognized that when petitioner took over the drilling a new contract was made; that unless the consideration for the drilling was expressly stipulated at twenty cents per hole, it could not bind the petitioner to that amount. Consequently, use-plaintiff pleaded the modification that petitioner would

do the drilling for twenty cents per hole. In fact, in support of its pleading, the use-plaintiff offered proof of such an express agreement. The trial court did not accept that proof, however. It found instead that the parties had not come to any agreement on petitioner's charge for the drilling (20s). This was an acceptance of petitioner's position which was that no price had been agreed upon because the petitioner could not know its cost until he had done the work. Then, instead of allowing petitioner a fair and reasonable value or perhaps its cost of the drilling operation, the trial court allowed the twenty cents which plaintiff was claiming. The Court of Appeals in general terms and without discussion of the problem of proof and of the law of damages which allows a *quantum meruit* recovery where no price is stipulated, found that the twenty cent credit allowed by the trial court was proper.

The handling of the petitioner's claim for delayed delivery, by the Court of Appeals, too, was a mere repetition of what the trial court had said without adverting to the conceded facts of delay or to the arguments advanced by the petitioner in its appeal. Here it could be said that there is a complete failure to understand the facts. The Court of Appeals' statement that there was no "credible evidence" to establish the amount of delay means that even use-plaintiff's evidence of the dates of delivery were incredible. These dates were conceded. Delivery was conceded. It would not take much calculations to compare these delivery dates to the stipulated dates of deliveries and arrive at the number of days the deliveries were late. It is apparent that the failure to read here was not only of the evidence but also of appellant's point on the subject.

The use of name calling by the Court of Appeals, too, is indicative of its failure to understand all the evidence. If it did understand, it would have no need to call names.

The treatment of the question relating to the appeal from the order striking the name of the surety as an appellant also, indicates that the Court of Appeals had not understood petitioner's brief on this head. Petitioner had stated that that matter would be important only if there was a reversal from the judgment in favor of the use-plaintiff. As there was an affirmance, that matter did not have to be considered. Yet, the Court of Appeals devoted a great deal of time to it and reserved some of its choicest language to ridicule an argument of law, which, because it was not held in sympathy at the moment, probably eluded the court. It made fun of petitioner's claim to a denial of due process. Yet, the court does not talk of the reason why the claim was made. Instead, it finds that a certain notice of proceedings to the petitioner was sufficient, when petitioner had, all along, conceded the sufficiency of that notice. The petitioner had complained that it had had no notice of a later consideration of the matter, but of this, the court does not say a word. It merely found fault with petitioner's position anyway. Still another thought on the subject is the fact that the Court of Appeals said, "As Judge Byers credited the testimony of the witnesses for the lumber company and did not believe the testimony of Gustavsson's witnesses, we are at a loss to discover any basis for reversal of the judgment on the merits." This position was strangely enough put forward by the Court of Appeals upon the argument of the appeal. It did not want to hear the argument on the merits. It gave generously of its time on the argument, limiting the discussion, however, to procedural questions. As to the merits, the court seemed intent on not disturbing the findings of this very fine trial judge. It was difficult for appellant to say anything about the arbitrariness of that judge as he had died shortly before the argument.

This attitude of the Court of Appeals expressed openly on the hearing, confirmed in the foregoing excerpt from its decision, gave birth to the idea that the Court of Ap-

peals had not properly applied the clearly erroneous rule, as it probably did not examine the facts to see if petitioner's claims that there was no support for the trial court's findings or that such findings were against the conceded evidence and, in some cases, against the only evidence on the subject, was well founded.

As a matter of fact, the Court of Appeals shows its lack of familiarity with the subsidiary facts in the manner with which it treats the Saladino diary. This was a personal log of the chief engineer of the petitioner, who kept it for his own purposes without instructions from petitioner. It was a fortuitous matter for petitioner to have had in its employ one who was methodical enough to make daily entries of events happening on the job. Petitioner actually had no record of the job performance of its own. The trial court in its decision lambasted (without just cause) the credibility of petitioner's oral testimony. It made disparaging remarks about petitioner not keeping records. It belittled the written notice of claim, Defendant's Exhibit K, but said not a word against the diary. This was in keeping with his view expressed during the course of the trial, that he did not believe that the diary was kept in anticipation of the trial.* This was the nicest thing he had said about petitioner's case and the trial was then four or five days old and the record was some 990 pages long. Although this expression was only a negative expression, it did mean that he believed that the engineer had put down in his diary what he believed had happened during the day. On the other hand, the Court of Appeals, imbued with a sense of outrage (without just cause) against petitioner's cause, but apparently, not knowing this nuance in the happenings at the trial but bent on castigating petitioner's position said, "The most charitable view of what Judge Byers thought of the Saladino log and Exhibit K strongly relied upon by Gustavsson on this appeal, is that they were wholly

* See page 972 of the transcript of the trial.

unreliable supports for Gustavsson's fantastic claims" (36s). Yet, as stated above, Judge Byers did not attack the diary.

Also, further on in its decision, the Court of Appeals referred to petitioner's claim of uncontradicted evidence as, "True it is that Gustavsson himself and Saladino, his enginer, were ready at all times to say they saw this and saw that, * * *" but not a word is said about the testimony of their men and of the government inspector on the job, one Fritzon, who said that Gustavsson's men "worked" in correcting the fabrication of the timbers; that two assemblies of the timbers were undertaken, in the first of which the men prepared the lumber in the manner called for by use-plaintiff's contract and that this work was done between May 22, 1959 and December 1, 1959 and continued in April, 1960 and in May, 1960. The nature of the work was minutely spelled out, on a day-to-day basis, on the cross-examination of both Saladino and Gustavsson. On a given day, the witnesses said they were drilling or were layout out the timbers or were dadoing or were chamfering or cutting down, or a combination of all these operations were performed, either alone or in conjunction with each other or with other work. Always the number of men employed in a given operation was given and the specific number of hours spent in the separate operations performed during the day was stated. There was not a word of denial of this regimen of work, from use-plaintiff. Yet, it is Mr. Anderson's claim that he visited the job several times a week through this period. This testimony is spread over more than 1,000 pages of the testimony. The Court of Appeals does not mention it. The petitioner made a point of it. In fact, it tried to emphasize this as its central point for reversal.* All that work, it was thought, could not escape the attention of the Court of Appeals, as it, apparently, had the attention of the trial judge. One can

* See pages 20-30 of Appellant-Intervenor's Reply Brief with particular reference to pages 21-22.

hardly open the transcript of the trial at its median pages without finding an explanation of what part of this work was being done, which day it was, whether the work was done in the morning, afternoon or whether it had occupied the whole of that day and how many men and how many hours were so employed.

The amount of this work done lies at the bottom of petitioner's strength in resisting this claim. Use-plaintiff had recognized its liability, otherwise it would not have tried to agree to try to settle this case in that long period of time between April and August, 1959. On the trial, its witnesses stated that they had offered to pay petitioner for the corrective fabrication and to replace the damaged timbers. The trial court had said that there had been a failure on the part of the petitioner of proof. It suggested that that proof should have shown the specific timbers affected and what specific work was done to each such timber. The separate timbers were not identified by number or name and no specification of identity other than that they belonged to one of four groups, according to their sizes, was present. How could this identification then take place? The work of this prior assembly was confirmed by Fritzon, the Government inspector, and by the daily work progress reports he had made. He had identified the Saladino log as an accurate record of the way the job had progressed. This log, too, showed the work in quite detailed form. Yet, not a word of understanding is stated by the Court of Appeals on this all important point. The use of strong language in characterizing the petitioner and even the attorney is uncalled for. It is abusive of the parties attacked. It is not descriptive of the facts in the case. There is no record of any action of the petitioner, its officer or its attorneys which would motivate the courts in their choice of language. Without doubt, such language was probably chosen to cover the weakness of their judicial discernment. The record speaks for itself and therein it is clear that there is no support for the abusive language used by both courts below and no support either for the findings of so-called

"substantial" performance by use-plaintiff. Nor was there any recognition by the courts below of the conceded and uncontradicted facts of what the nature of the contract was and of the failure of use-plaintiff to perform its contract. Petitioner, consequently, feels that these failures of the Court of Appeals lead to the conclusion that it had failed to apply the "clearly erroneous" rule properly.

As stated above, this point II is being made only in the event that this court does not wish to review the denial of a jury trial. It is submitted, that the handling of this case shows a proneness to go along with the trial court's findings. That the Court of Appeals may find that there is supporting evidence for the decision of the trial court in spite of the appellant's urging that there is none, of course, does not excuse the court from examining the record whenever the merits of the decision of the trial court is under attack. It is the duty of the reviewing court to be sure the trial court had not acted arbitrarily, or made a mistake of law. As this court has the right of such an examination and even the duty of supervision, and, as in this case, a gross miscarriage of justice has occurred in that a workman is not paid for work performed but a contracting party is allowed his full contract price in spite of a lack of proof of his own performance, a miscarriage of justice which could have occurred only by reason of judicial failure, it is respectfully submitted, that it would serve the national interest if this court would examine the subsidiary facts and right the wrong that has been done here, in reminder to the appellate courts that their duty is not done unless they themselves discover the supporting facts in the record for the decision of the trial court.

WHEREFORE, petitioner prays this court to issue its writ to review the decision of the Court of Appeals affirming the judgment below.

Respectfully submitted,

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